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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO.

ARMANDO VALERIANO,

Petitioner

V.

STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE

STATE OF CONNECTICUT

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March 9, 1984

QUESTIONS PRESENTED

1. Whether the refusal of the Connecticut Superior Court to charge the jury in petitioner's murder case concerning petitioner's theory of the case denied him due process of law.

2. Whether the Connecticut Superior Court's refusal to permit the defendant in a murder trial to conduct meaningful cross-examination of the only prosecution witness denied him due process of law.

TABLE OF CONTENTS

	Page
OPINION BELOW.....	2
JURISDICTION.....	2
QUESTIONS PRESENTED.....	2
CONSTITUTIONAL PROVISIONS INVOLVED.....	3
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE WRIT.....	10
I THE COURT'S REFUSAL TO CHARGE THE JURY CONCERNING PETITIONER'S THEORY OF THE CASE DENIED HIM DUE PROCESS OF LAW..	10
II THE STATE COURT'S REFUSAL TO PERMIT THE DEFENDANT IN A MURDER TRIAL TO CONDUCT MEANINGFUL CROSS-EXAMINATION OF THE ONLY PROSECUTION WITNESS DENIED HIM DUE PROCESS OF LAW..	17
CONCLUSION.....	36

TABLE OF AUTHORITIES

CASES:	Page
Alford v. United States, 282 U.S. 687 (1931).....	35
Brooks v. Tennessee, 406 U.S. 605, 612 (1972).....	10,11
Chapman v. California, 386 U.S. 18, 24 (1967).....	34
Fountain v. United States, 384 F.2d 624, 628 (5th Cir. 1967), cert. denied sub. nom. Marshall v. United States, 390 U.S. 1005 (1968).....	20
Hoffman v. United States, 341 U.S. 479, 486-87 (1951)....	20
Klein v. Harris, 667 F.2d 274, 287 (2d Cir. 1981).....	22,34
Kohler v. Commonwealth, 492 S.W.2d 198 (Ky App. 1973).....	10
Moynahan v. Manson, 419 F.Supp. 1139 (D.Conn. 1976).....	35
Mullaney v. Wilbur, 421 U.S. 684 (1975).....	11

Page

Patterson v. New York,
432 U.S. 197 (1977)..... 11

Pointer v. Texas,
380 U.S. 400, 403 (1965)..... 33

Reese v. State,
458 A.2d 492
(Md. Spec. App. 1983)..... 36

Rogers v. United States,
340 U.S. 367 (1951)..... 19

Sandstrom v. Montana,
442 U.S. 510, 524 (1979)..... 16

United States v. Apfelbaum,
445 U.S. 115, 117 (1980)..... 19

United States v. Brady,
561 F.2d 1319, 1320
(9th Cir. 1977)..... 35

United States v. Cardillo,
316 F.2d 606 (2d Cir.),
cert. denied 375 U.S.
822 (1963)..... 35

United States v. Felsen,
648 F.2d 681, 685-86
(10th Cir.), cert. denied
102 S.Ct. 317 (1981)..... 10

United States v. Lawson,
683 F.2d 688 (2d Cir. 1982).... 35

Page

United States v. Lindstrom,
698 F.2d 1154
(11th Cir. 1983)..... 35

United States v. Pritchett,
699 F.2d 317
(6th Cir. 1983)..... 35

United States v. Seifert,
648 F.2d 557, 561
(9th Cir. 1980)..... 20

United States v. St. Pierre,
132 F.2d 837, 840
(2d Cir. 1942),
cert. dismissed 319 U.S.
41 (1943)..... 19

United States v. Washington,
688 F.2d 953
(5th Cir. 1982)..... 10

United States v. Zappola,
646 F.2d 48, 53
(2d Cir. 1981)..... 21,22

Washington v. Texas,
388 U.S. 14, 19 (1967)..... 16

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STATE OF CONNECTICUT

The petitioner, Armando Valeriano, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on December 27, 1983.

OPINION BELOW

The opinion of the Supreme Court of the State of Connecticut is reported at 191 Conn. 659 (1983) and appears in the Appendix hereto.

JURISDICTION

The opinion of the Supreme Court of the State of Connecticut was entered on December 27, 1983. A timely motion to reargue was denied on January 26, 1984, by that court, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the refusal of the Connecticut Superior Court to charge the jury in petitioner's murder case concerning petitioner's theory of the case denied him due

process of law.

2. Whether the Connecticut Superior Court's refusal to permit the defendant in a murder trial to conduct meaningful cross-examination of the only prosecution witness denied him due process of law.

CONSTITUTION PROVISIONS INVOLVED

AMENDMENT XIV

Section 1. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

Armando Valeriano, the petitioner here, was convicted in the Connecticut Superior Court of felony murder for having hired another individual to set fire to rental

property owned by petitioner's wife. [R. pp. 2,25] An infant, injured in the fire, died of her injuries somewhat more than one year later. The Connecticut Supreme Court affirmed the conviction.

At approximately 6:57 p.m. on January 14, 1977, members of the New Haven, Connecticut Fire Department responded to an alarm at 281-283 Newhall Street. [11/5/79 Tr. p. 73] The firefighters traced the source of the fire to an area at the rear staircase starting on the second floor. [1/8/80 Tr. p. 80] In the attic they found the remains of a plastic jug which apparently had contained gasoline. [11/5/79 Tr. pp. 164-65]

While fighting the blaze, firefighters discovered a man crouched over a baby in one of the bedrooms. [11/5/79 Tr. pp.

84-85; 11/6/79 Tr. pp. 75-76] The baby, who was subsequently identified as Tashika Nelson [11/6/79 Tr. pp. 89-90], the six-month-old daughter of the apartment's tenant, died in April of 1978. [1/23/80 Tr. p. 216] Except for these two -- Tashika Nelson and her father -- no one else was in the building at the time of the fire. [11/7/79 Tr. pp. 3-4; 1/16/80 Tr. p. 102]

On June 19, 1978, shortly after the infant's death, Armando Valeriano -- the petitioner here -- was indicted for felony murder under the provisions of §53a-54c of the Connecticut General Statutes. [R.p. 2]

Julian Taylor, the State's chief witness at trial, confessed to setting the fire. [2/6/79 Tr. pp. 30-31] He accused Mr. Valeriano of paying him to set fire to

the house. [12/6/79 Tr. pp. 23,59] Much of the trial focussed on this witness, the only witness who attempted to connect Mr. Valeriano to the fire.

Mr. Taylor had an extensive mental health history [12/19/79 Tr. passim]; he had been in and out of mental institutions [12/19/79 Tr. pp. 3,7-9,32,46,72,137,142-43; 12/10/79 Tr. p. 13]; he had a history of alcohol and drug abuse [12/19/79 Tr. pp. 3, 8,24,27,34,41,114,137,161-65]; he had a long criminal record, including arrests and convictions for forgery [12/19/79 Tr. pp. 51-52,63; 1/2/80 Tr. pp. 56,87,112-33], stolen checks and bonds [1/2/80 Tr. pp. 56, 79-80,83], and burglaries [1/2/80 Tr. pp. 77-78,82-83]; and had frequently been incarcerated [12/19/79Tr. pp. 5-6,21,37,53, 66; 1/2/80 Tr. pp. 80,83]

Mr. Taylor was the only witness to connect the petitioner with the crime. Yet, on cross-examination, he was allowed repeatedly and irrationally to invoke the Fifth Amendment as an excuse for refusing to answer the questions of defendant's counsel -- including questions regarding prior occasions on which he had falsely accused others of committing crimes. [e.g., 1/2/80 Tr. pp. 5,13-17] The trial court sustained Taylor's refusal to answer these questions, and the Connecticut Supreme Court affirmed those rulings.

The evidence indicates that Tashika Nelson's death was unintentional and unforeseen. [12/6/79 Tr. pp. 22,33,41-41; 12/11/79 Tr. pp. 110-12,115] In addition, there was no evidence that Mr. Valeriano committed or solicited the homicide, or

that he was armed with a deadly weapon or dangerous instrument. The evidence readily supports the conclusion that Mr. Valeriano did not reasonably believe that Julian Taylor was armed or that Mr. Taylor's conduct might result in the death or serious injury of another. [11/7/79 Tr. p. 80; 12/6/79 Tr. pp. 22,33,41-42; 12/11/79 Tr. pp. 110-12,115]

Aside from attacking the credibility of the chief prosecution witness, Mr. Valeriano's defense was the affirmative defense provided by §53a-54c of the Connecticut General Statutes:

> "[I]t shall be an affirmative defense that the defendant: (A) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid

> the commission thereof; and (B) was not armed with a deadly weapon, or any dangerous instrument; and (C) had no reasonable ground to believe that any other participant was armed with such a weapon or instrument; and (D) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury."

Despite timely and repeated requests, the trial court refused to instruct the jury on this defense. [11/5/79 Tr. pp. 22-24,34-38,53; 2/4/80 Tr. pp. 17-18,29, 47; 2/7/80 Tr. pp. 24-25,35-36] The Connecticut Supreme Court found no error in this refusal.

REASONS FOR GRANTING THE WRIT

I

THE COURT'S REFUSAL TO CHARGE THE JURY CONCERNING PETITIONER'S THEORY OF THE CASE DENIED HIM DUE PROCESS OF LAW

The refusal to charge the jury concerning the defendant's theory of the case, if that theory is supported by the evidence, denies due process of law. See United States v. Washington, 688 F.2d 953 (5th Cir. 1982); United States v. Felsen, 648 F.2d 681, 685-86 (10th Cir.), cert. denied, 102 S.Ct. 317 (1981); Kohler v. Commonwealth, 492 S.W.2d 198 (Ky.App. 1973). In a case like this one, in which failure to charge the defense theory prevented the jury from even considering it, the refusal so to charge in effect denies the defendant his right to present a defense. Brooks v.

Tennessee, 406 U.S. 605, 612 (1972).

Even assuming after Mullaney v. Wilbur, 421 U.S. 684 (1975), and Patterson v. New York, 432 U.S. 197 (1977), that the State may constitutionally burden a defendant with proving an affirmative defense, as under Conn. Gen. Stat. §53a-12(b), the petitioner clearly established all affirmative defenses. The evidence presented at trial would support a jury's finding that each of the four aspects of the affirmative defense had been proved by a preponderance of the evidence.

That the requirements of sub-section (A) of the statute were met is not disputed. At no time did any of the State's witnesses, including its chief witness Julian Taylor, ever claim that Mr. Valeriano committed a homicidal act or

solicited, requested, commanded, importuned, caused, aided the commission of such an act. At most, the State claims that Tashika Nelson died as the result of a fire which Mr. Valeriano planned. The arson itself cannot constitute the "homicidal act" described by sub-section (A) for the same reasons discussed below with reference to sub-section (C) of the statute.

Nor is there any dispute as to whether the requirements of sub-section (B) were met. The State never claimed that Mr. Valeriano was armed with either a deadly weapon or a dangerous instrument.

Similarly, petitioner has met his burden with respect to sub-section (C). There was no evidence that petitioner knew or had any reason to know that Julian Taylor was armed. In fact, the State never

claimed that Mr. Valeriano had a reasonable ground to believe that Julian Taylor was armed with either a deadly weapon or a dangerous instrument of any sort.

Assuming the facts most favorable to the State, Mr. Valeriano might have known that Julian Taylor had the materials with which to set a fire. Every case of arson necessarily involves an instrument capable of setting a fire which may cause death or serious physical injury. The materials used by Julian Taylor to start the fire, however, cannot be considered a "dangerous instrument" under Connecticut General Statutes §53a-3. If they were, the affirmative defense in §53a-54c would have no meaning in the case of arson-murder. Proof of the underlying crime of arson would carry with it proof of the use of incen-

diary materials which, if they are considered to be a "dangerous instrument," would automatically disprove the affirmative defense.

The only part of the affirmative defense where the State had even a colorable claim was sub-section (D). Even there the evidence in the Record raised a question of fact which could be decided only by a jury.

The prosecutor's key witness testified repeatedly that the house was supposed to be empty at the time of the fire. [12/6/79 Tr. pp. 22,33,41-42; 12/11/79 Tr. pp. 110-12,115] According to him, Mr. Valeriano took precautions to insure that the tenants were not home. According to the State's own version of the evidence, Mr. Valeriano himself made sure that the downstairs

tenant, Ollie Gomez, was out of the building. [11/7/79 Tr. p. 80; 12/6/79 Tr. pp. 22,29; 12/11/79 Tr. p. 110] He also took the upstairs tenant, Joann Nelson, with him [11/7/79 Tr. p. 80] and assumed that the apartment would be empty if no car were parked in front of the building. The Record, therefore, supports the conclusion that, even if Mr. Valeriano were involved in the arson, he had no reasonable ground to believe that the fire would result in death or serious physical injury.

Failure to charge the jury with the full language of the statute made it impossible for the jury to absolve Mr. Valeriano of legal responsibility for the death of Tashika Nelson on the basis of the affirmative defense. If the trial judge had instructed the jury on the affirmative

defense, the jury might have found Mr. Valeriano not guilty of arson-murder even if the State met its burden of proving the essential elements of the offense. Without such a charge, however, "the jury may have interpreted the judge's instruction as constituting...a conclusive presumption... [and] have deprived [the] defendant of his right to the due process of law...." Sandstrom v. Montana, 442 U.S. 510, 524 (1979).

This Court in Washington v. Texas, 388 U.S. 14, 19 (1967), has held that criminal defendants have a fundamental due process right to establish a defense. The Connecticut Supreme Court has denied petitioner that right.

II

THE STATE COURT'S REFUSAL TO PERMIT THE DEFENDANT IN A MURDER TRIAL TO CONDUCT MEANINGFUL CROSS-EXAMINATION OF THE ONLY PROSECUTION WITNESS DENIED HIM DUE PROCESS OF LAW

The State's key witness, Julian Taylor, was the only witness who connected Mr. Valeriano to the crime. His testimony constituted virtually the entire case against Mr. Valeriano. Mr. Taylor testified irrationally, inconsistently and non-responsively. On cross-examination, he evaded counsel's questions or did not answer at all, at his own discretion. As a result, Mr. Valeriano was unable adequately to cross-examine his accuser and was thereby denied his constitutional right to confront the State's chief witness, as guaranteed by the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment to the

United States Constitution.

Taylor repeatedly hid behind a Fifth Amendment claim of privilege. The trial court allowed and even encouraged Taylor to select his own cut-off point, testifying when and how he chose. Mr. Taylor was able to distort and garble the truth by testifying about incidents as to which he later, inconsistently, claimed a Fifth Amendment privilege. In those numerous instances when Mr. Taylor invoked the Fifth Amendment, Mr. Valeriano was unable to elicit any answers except those which Mr. Taylor chose selectively to give. Mr. Valeriano was, therefore, denied the basic protections of the Sixth and Fourteenth Amendments.

The constitutional protections guaranteed a witness by the Fifth Amendment are a

shield against coerced self-incrimination. They are not a sword to be used at the witness's pleasure against a criminal defendant. See United States v. Apfelbaum, 445 U.S. 115, 117 (1980) (Fifth Amendment privilege allows witness to remain silent but not to swear falsely); Rogers v. United States, 340 U.S. 367 (1951) (witness should not be allowed to distort the facts by selective testimony); United States v. St. Pierre, 132 F.2d 837, 840 (2d Cir. 1942), cert. dismissed, 319 U.S. 41 (1943) (privilege to suppress the truth is not a privilege to garble it).

A witness's direct testimony may be stricken if "the defendant [was] deprived of his right to test the truth of the direct testimony....if he [was], so much of the direct testimony as [could not] be sub-

jected to sufficient inquiry must be struck." Fountain v. United States, 384 F.2d 624, 628 (5th Cir. 1967), cert. denied sub. nom. Marshall v. United States, 390 U.S. 1005 (1968). In this case, Mr. Valeriano was limited in his cross-examination of Julian Taylor on issues directly relevant to the case. That testimony, therefore, should have been stricken from the Record. United States v. Seifert, 648 F.2d 557, 561 (9th Cir. 1980).

Throughout the testimony, it is clear that Mr. Taylor, not the trial judge, determined which questions he would answer and which he would not answer because his answers would tend either to incriminate or simply to embarrass him.

This Court squarely held in Hoffman v. United States, 341 U.S. 479, 486-87 (1951)

that it is for the trial judge to decide whether the privilege is justified. The judge must "undertake a particularized inquiry to determine whether the assertion was founded on reasonable fear of prosecution as to each of the posed questions." United States v. Zappola, 646 F.2d 48, 53 (2d Cir. 1981). The trial judge in this case abdicated his responsibility by allowing and even encouraging Julian Taylor to assert a Fifth Amendment privilege at will.

Even assuming that answering selected questions might have tended to incriminate him, it is clear that Mr. Taylor repeatedly waived his right to silence. Waiver shall be inferred if "(1) the witness's prior statements have created a significant likelihood that the finder of fact will be left with and prone to rely on a distorted view

of the truth, and (2, the witness had reason to know that his prior statements would be interpreted as waiver of the Fifth Amendment's privilege against self-incrimination." Klein v. Harris, 667 F.2d 274, 287 (2d Cir. 1981). Mr. Taylor testified voluntarily, under oath, in such a way as intentionally to distort the truth and to accuse Mr. Valeriano. He unequivocally waived his Fifth Amendment privilege.

The trial court repeatedly upheld Julian Taylor's assertion of a Fifth Amendment privilege based purely on Mr. Taylor's embarrassment, personal sensibilities and whims rather than a legitimate claim of self-incrimination. The particularized inquiry to be undertaken by the trial judge, as required by United States v. Zappola, supra, was a sham. The court made

no independent determination that Mr. Taylor's claims were valid. In those instances when Mr. Taylor might have had a valid Fifth Amendment claim, he clearly waived the privilege.

For example, on December 20, 1979, the following colloquy took place [12/10/79 Tr. pp. 14-15,22-23]:

"Q Now, that surgery was performed because you had suffered a gunshot would in that area of your body; is that true?

A Correct, sir.

Q And that was a gunshot wound that you inflicted on yourself; wasn't it?...

A -- no, sir.

Q You said not?

A (No response.)

Q Mr. Taylor, if you didn't shoot yourself, who shot you?...

THE WITNESS: Your Honor, in relation to that incident, I am not going to discuss it. I have admitted suffering a gunshot wound, and as far as that, that is all I am going to admit to. I had surgery --

THE COURT: Would you prefer waiting for [your attorney]?

THE WITNESS: Yes, I have already discussed it with [my attorney], but I also want him here. I have admitted to the Court that I had surgery and I was shot. As far as anything else that is dealing with my personal life -- ...

THE WITNESS: As far as to the question, I invoke the Fifth Amendment.

Q You what? You are claiming that if you tell us who shot you, you will be incriminating yourself?

A I didn't say that....

THE COURT: The Fifth Amendment, Mr. Taylor -- what you are saying, in effect, is that you will not answer that question on the basis it may be self-incriminating; is that correct, sir?

THE WITNESS: Yes, sir.

MR. WILLIAMS: I ask that the witness be directed to answer. It is patently absurd, with all deference, for a man to come in here and tell us who committed a crime against him, he is going to be incriminated, since he has already denied that he shot himself.

THE COURT: Mr. Williams, you may have an exception for the record. The witness has invoked the Fifth Amendment indicating that invoking the privilege against self-incrimination. I am going to allow it....

MR. WILLIAMS: I want to make a motion

with regard to all of this witness' prior testimony. If he can be allowed to testify for one side and then take the Fifth, when I try to cross him, then that's a denial of the right to confrontation and his entire testimony should be stricken at this time and I so move.

THE COURT: Motion is denied. Exception is noted for the record."

The trial judge upheld Julian Taylor's assertion of privilege with no further inquiry. Mr. Taylor's only justification for his claim -- that the question deals with his family life -- is not a legitimate ground for claiming the privilege. In no way could an answer be incriminating. If Mr. Taylor spoke truthfully when he denied shooting himself, identification of the shooter could incriminate him only if he

had illegally caused the shooting.

Later the same day, Mr. Taylor again invoked the Fifth Amendment [12/10/79 Tr. pp. 52-54]:

"Q Mr. Taylor, it is true, isn't it, that on the night of the 29th of September to the 30th of September, during that night, you did, in fact, shoot your wife twice in the chest?...

A You're liar.

Q You deny shooting your wife?

A I said you are a liar.

THE COURT: Mr. Taylor, the answer is yes, no, I invoke the Fifth or I want to talk to my lawyer? But, you have got to answer the question. That was a question and not a statement.

THE WITNESS: I answered the question, to the best of my ability....I think he

knows what I called him. I said the answer is no, and I am still invoking the Fifth in regard to that whole incident.

Q Is your answer no? Your answer is no, isn't it?

A I just invoked the Fifth in regard to that....

THE COURT: Do you feel, in answering that question, that that question might tend to incriminate you in some way, is that the reason you are invoking the Fifth?

THE WITNESS: For two reasons. Number one, the man is telling a lie as I stated in Court.

The other reason I am invoking it, it has nothing to do with this case here, felony murder.

MR. WILLIAMS: Because of that, I ask that the witness be directed to answer the

question. Those are not proper grounds....

THE COURT: Mr. Taylor, the Fifth Amendment protects any person from making any statement that would be self-incriminating. That is the whole purpose of taking the Fifth....

Any other reason is that it may tend to incriminate, not does. May tend to. Any other reason is not acceptable under the Fifth Amendment.

THE WITNESS: I will take the Fifth Amendment on that. And as I asked the Court yesterday, when it comes to my family --

THE COURT: All right, sir. Enough. He has invoked the Fifth. I am going to accept that, sir.

MR. WILLIAMS: Can I have an exception?

THE COURT: Exception is noted."

The State court's exceptionally permissive view of the Fifth Amendment was especially prejudicial to the petitioner when it allowed Taylor on that ground to refuse to answer questions about earlier occasions on which he had falsely accused others of crimes:

"Q And the purpose of that meeting [with Detectives of the Hartford Police Department] was that you accused the woman who was then your wife of attempting to murder you; isn't that true?

A I'll take the Fifth on that, sir.

Q I beg your pardon?

A I'll take the Fifth on that....

THE WITNESS: May I say something, your Honor? This involves my mother and father. My mother and father have nothing to do with this case.

In order to show the Court that things were taken out of my house that I was living there, they were owned by me solely, things were returned to my mother's house by my ex-wife and her brother or she would have been arrested.

Now, my family is not on trial here. Mr. Valeriano's family is not on trial here. It is just Mr. Valeriano and myself. And I have asked that my mother and father's name not be brought in here or my family and this has been brought up here....[1/2/80 Tr. pp. 5,13-14]

Q Did you tell Detective Bolden and Detective Morris that your wife, Julie Taylor, had stolen household items out of your house after the time of the shooting and while you were hospitalized?...

A Yes, sir.

Q You did tell them that?

A I said I am taking the Fifth.

Q I'm sorry. I thought you said, yes, sir. [1/2/80 Tr. pp. 16-17]

Q When do you claim that you were married to Julie Taylor?

A I'll take the Fifth on that.

MR. WILLIAMS: May the witness be directed to answer?

THE COURT: Can I see the attorneys a moment?

(Discussion off the record at the bench.)

THE COURT: The witness invoked the Fifth. The Court will allow it....[1/2/80 Tr. pp. 44-46]"

The trial judge's failure to strike Mr. Taylor's testimony did not constitute harmless error. No other witness connected Mr.

Valeriano to the fire at 281-283 Newhall Street. The State's whole case rested on Mr. Taylor's testimony. Therefore, Mr. Taylor's credibility was central to the case. The defense should have been allowed to demonstrate Mr. Taylor's propensity to lie and to accuse falsely. If the defense had been allowed to show Mr. Taylor's complete unreliability, it would have undercut the State's chief witness and destroyed the core of the State's case.

A state defendant's basic constitutional right to confront his accuser is guaranteed to him by the Due Process Clause of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403 (1965). Therefore, when the trial court allowed Mr. Taylor to testify selectively and to take the Fifth Amendment improperly, it denied

Mr. Valeriano his constitutional right to cross-examine and confront his accuser. Under Chapman v. California, 386 U.S. 18, 24 (1967), a reviewing court must inquire whether the constitutional error was harmless beyond a reasonable doubt. Using this standard, it is clear that the lower court committed reversible error when it allowed Mr. Taylor to distort and garble the truth and prevented Mr. Valeriano from challenging fully his only accuser's credibility.

In Klein v. Harris, supra, at 289-90, the Second Circuit found reversible error when the State's chief witness, who privately recanted, was allowed to take the Fifth Amendment after accusing the defendant, even though another witness also had accused the defendant. In this case, there was no other witness. The fact that Julian

Taylor took the Fifth Amendment on questions attacking his credibility rather than issues directly related to the charge against Mr. Valeriano should not matter. Mr. Taylor's credibility is central to the case. Granting Julian Taylor's Fifth Amendment claim and failure to strike Mr. Taylor's testimony deprived Mr. Valeriano of his constitutional right to confront his accuser. Alford v. United States, 282 U.S. 687 (1931); United States v. Lawson, 683 F.2d 688 (2d Cir. 1982); United States v. Cardillo, 316F.2d 606 (2d Cir.), cert. denied, 375 U.S. 822 (1963); United States v. Pritchett, 699 F.2d 317 (6th Cir. 1983); United States v. Brady, 561 F.2d 1319, 1320 (9th Cir. 1977); United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983); Moynahan v. Manson, 419 F.Supp. 1139 (D.

Conn. 1976); Reese v. State, 458 A.2d 492 (Md.Spec.App. 1983).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Connecticut.

Respectfully submitted:

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March 9, 1984